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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1557

J. EDWIN LAVALLEE, Warden, Clinton State Prison, Dannemora, New York,

Petitioner,

against

LOUIS HENRY BURNS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the Warden of Clinton State Prison, Dannemora, New York, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the case of *United States of America ex rel. Louis Henry Burns* v. *LaVallée.* The judgment was entered on December 21, 1970. Rehearing was denied on March 3, 1971, Judge Hays dissenting. On March 25, 1971 the Court of Appeals granted a motion to stay its mandate provided that the instant petition was filed by April 8, 1971.

Opinions Below

The opinion of the Court of Appeals is not yet reported. It is reproduced as Appendix "A" to this petition. The opinion of the United States District Court for the

Northern District of New York is not officially reported. It is annexed as Appendix "B" to this petition.

The New York Court of Appeals wrote no opinion in affirming the Appellate Division. Its order is reported at 20 N. Y. 2d 814, 231 N. E. 2d 291. The order of the Court of Appeals denying reargument is reported at 21 N. Y. 2d 774.

The opinion of the New York Supreme Court, Appellate Division, Third Department, affirming respondent's judgment of conviction is reported at 27 A. D. 2d 861, 277 N.Y.S. 2d 530, and is reproduced as Appendix "C" to this petition.

The findings of the trial court with respect to the voluntariness of respondent's confession are not reported. They are set forth as Appendix "D" to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on December 21, 1970. The order of that Court permitting petitioner to file an untimely petition for rehearing was entered on January 26, 1971. The orders of the Court denying rehearing and rehearing *in banc* were entered on March 3, 1971. The order granting petitioner's motion to stay the mandate of the Court of Appeals and providing that the mandate would issue upon failure to file the instant petition by April 8, 1971, was entered on March 25, 1971.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented

1. Where a state tribunal has heard evidence and made findings of fact with respect to the voluntariness of statements to be offered at trial and where the adequacy of the

state court proceedings is in no way challenged, may a federal habeas corpus court, in the absence of a federal evidentiary hearing, reach a result contrary to that reached by the state courts by reassessing the totality of the circumstances surrounding the confession, by substituting its own judgment as to the materiality of certain circumstances and by making independent findings of fact?

2. Does the record support the finding of the Court of Appeals that respondent's confession was involuntary as a matter of law?

Statement of the Case

Respondent, Louis Henry Burns, is presently serving a sentence of from 20 years to life for the second degree murder of Doris Anderson. He was found guilty on January 26, 1966 after a jury trial in Sullivan County, New York, and was sentenced on March 8, 1966. The judgment of conviction was affirmed by the Appellate Division (*People* v. *Burns,* 27 A. D. 2d 861, 277 N.Y.S. 2d 530 [3rd Dept. 1967]) and by the New York Court of Appeals (*People* v. *Burns,* 20 N. Y. 2d 814, 231 N. E. 2d 291 [1967], rearg. denied 21 N. Y. 2d 774 [1968]). Certiorari was denied by this Court (*Burns* v. *New York,* 391 U. S. 956).

The central issue in this case is the deference to be given by a federal habeas corpus court to the state determination, after a pre-trial hearing, that certain oral and written admissions were voluntary beyond a reasonable doubt. This issue, which "is a serious one, whose decision would require detailed consideration of the opinions in Brown v. Allen, 344 U. S. 443 . . . and Townsend v. Sain, 372 U. S. 293 . . ., and the long history leading up to the 1966 legislation" (*United States ex rel. B.* v. *Shelly,* 430 F. 2d 215, 218 n. 4 [2d Cir. 1970]), has not been dealt with by this Court. It is an issue which recurs constantly and which is a present source of great uncertainty in federal review of state convictions.

The *Huntley* Hearing

Before trial, a lengthy hearing was held to determine the voluntariness of Burns' several statements to the police.* All of the relevant police officers and Burns himself testified. The relevant facts are most fully set forth in the opinion of the Appellate Division (14a-18a):**

> "Doris Anderson, with whom defendant lived, was fatally shot between the eyes, on or about April 27, 1965. The fact of her death was not known and her body was not immediately found and on May 9, 1965, defendant was questioned as to her disappearance by officer Scherpf, a State Police investigator, at the Monticello Police Station. According to Scherpf, defendant was asked some questions concerning the disappearance and denied any knowledge as to Doris' whereabouts. Defendant had appeared at the station house voluntarily and left after the several questions were put to him.
>
> On May 10, 1965, between four and five o'clock P.M., Sherpf went to the Club Paradise outside Monticello, accompanied by officer Buck, and finding defendant there asked him to accompany them to the Ferndale State Police Station and defendant agreed to go [***] He was not then placed under arrest. Officer Kaljian questioned defendant from about six P.M. to nine P.M. and during this time defendant was given some food [****] Thereafter Scherpf questioned defendant,

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* This hearing, mandated by the decision of this Court in *Jackson* v. *Denno*, 378 U. S. 368 was held pursuant to the guidelines laid down by the New York Court of Appeals in *People* v. *Huntley*, 15 N. Y. 2d 72, 204 N. E. 2d 179 (1965) requiring the prosecution to prove, beyond a reasonable doubt, that any statements it planned to offer at trial were voluntary.

** Numbers in parentheses followed by the letter "a" refer to pages in the Appendix to this petition.

[*** According to the undisputed testimony, Burns had been asked on May 9, if he would take a polygraph test. He said he would and told the officers "when we were ready to take him for this test he would either be at the golf club house, at Doris Anderson's home or the Club Paradise."]

[**** This interrogation was the polygraph test.]

starting around 10:45 P.M. and ending around 2:00 A.M. on the next day, May 11. Defendant told of his activities on the 27th of April and said that on the morning of April 28 he left the house with Doris asleep on the couch and that he had not seen her since. Subsequently Scherpf left the interrogation room, being relieved by Buck. Buck summoned Scherpf back at about 4:30 A.M. Both investigators were then joined by Lt. Yank of the Monticello police. At this point Scherpf informed defendant he was entitled to counsel, to which defendant replied, 'I don't need an attorney, I want to get this off my chest and I have been upset over it the past few days and I just haven't been right.' Thereupon defendant stated that he accidentally shot Doris when the gun went off in a scuffle between them; said that this occurred on April 27 in the evening during a heated quarrel which had its origin at the Club Paradise; that before grabbing the .22 calibre rifle Doris had tried to hit him with a whiskey bottle; and that when he jerked the gun away from Doris in her bedroom it discharged once, the bullet entering her forehead. After contemplating his course of action, defendant stuffed the body into a broom closet; cleaned up the rifle and disposed of the empty cartridge; took deceased's dog in deceased's car and left it in the lobby of the Gilbert Hotel in Fallsburg; he went to his job as caddy at the Concord Golf Course (it was then 7 A.M.) and along the way burned bloody linens and towels which he had taken from the house. After work on the 28th, defendant returned to deceased's house, placed her body in her car, and finally buried it in a shallow grave off Old Bailey Road.

Scherpf testified that claimant was formally placed under arrest at 4:30 A.M. and was requested to take the officers to the burial site. He complied and upon leaving the station was handcuffed for the first time. After disclosing the burial site, defendant was taken

to deceased's house where he re-enacted the event as he previously had described it. Upon the return to the State Police barracks, defendant's statement was reduced to writing by a question and answer process, being typed as it progressed. This started about 9:00 A.M., May 11, at which time defendant had some pastry and coffee. Again defendant was advised of his right to counsel, but rejected it. By 10:30 or 11 A.M. the typing had been finished and the seven-page statement was complete and signed. By the time the questioning had progressed to the sixth page, however, defendant was challenged as to the truthfulness of his account of the struggle, whereupon he changed his story. In the written statement defendant says he made a mistake; that during the struggle the gun went off, the bullet hitting the wall; that he then said, 'Bitch why do you want to shoot me, I didn't do anything to you'; whereupon, then being possessed of the gun, he put another bullet into the chamber, and discharged the gun as he turned around to face Doris, the bullet striking her between the eyes. Although the statement was taken and completed around 11 A.M., defendant was not arraigned until 2:30 P.M. There appears to be no explanation for this hiatus.

Scherpf testified that neither he nor any other officer that he knew of made any threats or promises to defendant. He said that he noticed no fatigue insofar as defendant was concerned (although he may have been a bit drowsy at times) and that defendant ate when the interrogators ate.

Buck, testifying as to his period alone with defendant, said that it began about 2:30 A.M. and lasted for about two hours. Defendant told the same story he had told the day before (May 9) about not knowing how Doris disappeared, but upon being told that he was lying, defendant said, 'OK, call your partner, I'll tell you where she is.' At this point Scherpf was

called back and defendant made his first statement (the 'one shot' or accident statement). Buck said that defendant never indicated that he wanted a lawyer. The rest of Buck's testimony conforms generally to Scherpf's.

Lt. Yank testified that he first questioned defendant on May 8 in the street, and that at that time defendant denied knowledge of Doris Anderson's disappearance. Lt. Yank said that on the evening of May 10 when defendant was taken to the State Police barracks he agreed to take a polygraph test after it was explained that he was free not to take it and could walk out of the room. This apparently was done in the early evening and fills the hiatus until 10:45 P.M. when Scherpf took over. Kaljian supervised the polygraph test. Yank also said that defendant partook of sandwiches and coffee in the early morning. According to Yank, defendant was sobbing at 4:30 A.M. when he finally came out with his 'one shot' statement. The rest of Yank's testimony conforms generally to Scherpf's and Bucks.

Contesting the voluntariness of the confession, defendant testified at the Huntley hearing only. He said that he told Scherpf, when the latter approached him on May 10 at the Club Paradise, that he had an appointment with Louis Tieger, a lawyer, and felt that he should be advised by him before accompanying Scherpf. It could well be, and doubtless was found that this claim was dissipated by the testimony of Mr. Tieger's secretary.[*] Defendant testified to nothing to account for the first two and one-half hours at the police barracks or until about 8 P.M. when he was questioned by Kaljian, apparently during the polygraph procedures. At about 10 P.M. he was taken

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[* She testified that she had received no such call and made no such appointment. Burns had specifically stated that he spoke with Mr. Tieger's secretary.]

> downstairs where nothing significant seems to have occurred until Scherpf began to question him, after returning him to an upstairs room at about 11 P.M. He said that he was then exhausted. Continuing, he said that Scherpf then left and Buck took over the questioning, in the course of which he theatened him with his revolver and otherwise, and finally recalled Scherpf, at which time, defendant asserts, he asked for and was denied counsel. Continuing, defendant did not recount his version of an accidental shooting but did tell of the visits to the burial site and to Doris' apartment and of the return to the barracks and the recording of the questions and answers. The transcription of these he disputed in some respects, without, however, stating—or being asked—whether the statements contained the truth. He conceded that no physical force had been exerted upon him."

At the conclusion of the hearing, the trial judge found, *inter alia,* that Burns was questioned with his consent on May 9, 1965 at the Monticello Police Station; that he was questioned with his consent at the State Troopers' Barracks between 6 P.M. on May 10 and 4:30 A.M. on May 11, 1965 and took a polygraph test; that he was arrested at 4:00 A.M. on May 10 and arraigned during which time he was photographed and fingerprinted and re-enacted the crime; that his statements were all made prior to arraignment and that he "waived his right to counsel after being advised of his rights to be represented by counsel" (27a-28a). The trial judge concluded "beyond a reasonable doubt" that the statements "were not obtained as a result of any coercion, physical or otherwise" and were voluntary; that Burn's right to counsel had not been violated; and, that "the facts and circumstances relating to the arraignment did not constitute any unnecessary delay which rendered the inculpatory statements involuntary" (28a).

The Appellate Division

After setting forth the facts, the Appellate Division which, in New York, has jurisdiction of the law and the facts, also concluded that Burns' statements were voluntary. The Court noted that the lapse of time between the hour when Burns was first met by the officers and arraignment "demanded and received at our hands the minute examination and analysis that we have attempted to give it" (19a). The Court pointed out that Burns' allegations of threats and lack of food "were resolved against him upon sufficient evidence" as was the issue of delay in arraignment "as bearing upon voluntariness" (19a). The Court noted that until 4:30 A.M. the police did not even know if Doris Anderson was dead or had met with any criminal act and that "there is no indication that the unexplained time interval [between 11 A.M. and 2:30 P.M.] . . . affected the previously completed statement" (19a). Finally, the Court held that "the aggregate of the periods of the defendant's interrogation, can[not] be found, as a matter of law, so extreme as to be coercive . . ." (19a).

The Petition for Habeas Corpus

Following affirmance of the Appellate Division by the New York Court of Appeals and the denial of certiorari by this Court, Burns sought habeas corpus in the United States District Court for the Northern District of New York. The petition relied for its statement of facts and arguments of law on the petition for certiorari previously denied by this Court. With respect to the statements it was alleged that Burns had been denied the right to counsel; that he had been held incommunicado and his wife and father-in-law had not been allowed to see him; that his arraignment had been delayed; and, that he had been threatened unless he gave a statement. The only relevant one of these allegations which was not found to be false was that there was a lapse between arrest and ar-

raignment.* That claim was held legally insufficient by the State courts and was not reached by the Court below. Thus, Burns did not make any of the allegations which the Court below held to have coerced his statement.

The Decision of the District Court

In denying the application for habeas corpus the District Judge examined the transcript of the state hearing and the state court appellate briefs for both sides. In dealing with the coerced confession claim the Court concluded that "it is clear there were reliable findings made after full and fair hearing, and further a satisfactory appellate canvass of the questions presented here . . . The New York courts have resolved the conflict in satisfactory manner and the petitioner has failed to bring himself within any of the reasons that permit a federal court to override such factual findings and analysis by the State Courts" (12a-13a).

The Opinion Below

The Court of Appeals after a selective review of the evidence concluded that "the undisputed facts (appellant's version is even more doleful) surrounding the obtaining of the written admissions which are the evidentiary basis for appellant's conviction on a charge of second degree murder established that those written admissions were the result of impermissible coercion" (8a). The Court then cited a number of cases which it averred "amply" supported its conclusion (8a). It acknowledged that "in each case to which we refer the presence or absence of some single fact may serve to distinguish appellant's precise situation" (9a) but concluded that under the totality of the circumstances the confession was coerced. The Court then declined to consider the additional contention that

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* The allegation that Burns' relatives were not permitted to see him related to a time after completion of the typed statement.

the delay in arraignment alone rendered the confession inadmissible and went on to express, but not resolve, its doubts as to the admissibility of any of Burns' statements at all (9a).

Reasons for Granting the Writ

1. The result below, contradicting a state determination made after a full and fair hearing, raises a serious and recurrent problem of the nature and scope of federal habeas corpus jurisdiction which merits plenary consideration by this Court.

The Court of Appeals held that "[a]ccepting the state court findings of the historical facts as true, we conclude that the written statement . . . was plainly involuntary, and that the contrary state conclusion on this issue is 'not fairly supported by the record.' 28 U.S.C. § 2254(d)(8)" (7a-8a). Without ordering any further hearing, the Court directed issuance of the writ, stating, without explanation, that "[w]e need not intimate our views as to whether 28 U.S.C. § 2254 does indeed apply to such a determination. See *United States ex rel. Stephen J. B.* v. *Shelly,* 430 F. 2d 215, 218 n. 4 (2d Cir. 1970)" (8a).

The Court fell into fundamental and pervasive error. In flatly refusing to consider the applicability of the only relevant statute, it worked a result whereby it, as a habeas corpus court, merely substituted its judgment on an "appeal" from the "lower" New York Court of Appeals.

This is not a case in which any one factor, such as physical abuse, *per se* renders a confession involuntary or where the involuntariness is conceded (see *Fay* v. *Noia,* 372 U. S. 391). Each factor in this case must be weighted along with all the other factors to arrive at a "totality of the circumstances." *Procunier* v. *Atchley,* —— U. S. ——, 39 U.S.L. Week 4125, 4127 (January 19, 1971). Moreover, unlike for example, the search and seizure

cases, the totality of the circumstances in a confession case must include, not only the conduct of the police but the impact of that conduct on the will of the particular person involved. Thus, in any case involving the "totality of the circumstances", but especially in confession cases, the "conclusion", e.g. of voluntariness, must depend not only on the historical facts (e.g. the defendant was questioned over a period of 21 hours; he received some food; he did not sleep; he waived his right to counsel), but on their weight in relationship to each other and to the defendant. It was for the trier of fact in the first instance to assess each fact and the function of the habeas corpus court must be to determine if the findings are supported in the record and, if necessary, to reconstruct findings from the record where they have not been adequately stated by the trier of fact. See *Townsend* v. *Sain*, 372 U. S. 293.

It is abundantly clear that the State hearing should have been dispositive here. The New York Courts "gave full consideration to the issue of the voluntariness of the respondent's statement, and . . . they applied correct standards of constitutional law in upholding its admission in evidence." *Procunier* v. *Atchley, supra* at 4127-28.

But even if the State findings were unsupported by the record, the only result is that they are not entitled to the presumption of correctness established by 28 U.S.C. § 2254(d). However, the statute and cases make it clear that removal of the presumption of correctness does not, in the normal case, entitle the petitioner to his release but rather to a hearing to determine the validity of the underlying claim. That is what should have been ordered in this case.

Although the cases are legion that a writ of habeas corpus may be *denied* on examination of an adequate state record, no case has stated what must happen if the record is determined to be inadequate, that is, that it does not in

the view of the federal judge support the conclusion stated by the finder of fact. We do not dispute the authority of the federal judge to determine the adequacy of a state record. See *Brown* v. *Allen*, 344 U. S. 443, 507-08 (FRANKFURTER, J.). Nor do we dispute the authority of a federal judge to issue a writ where the undisputed facts make a *per se* showing of involuntariness. Finally, we do not dispute the authority of a court on direct appeal to make an independent study of a lower court transcript and to arrive at a conclusion contrary to that reached by the lower court. See, e.g. *Darwin* v. *Connecticut*, 391 U. S. 346; *Greenwald* v. *Wisconsin*, 390 U. S. 510; *Haynes* v. *Washington*, 373 U. S. 503. We do dispute the authority of the habeas corpus court to sit solely as a court of appeals. The vital distinction between a direct appeal and habeas corpus is clearly pointed up in the 1966 amendments to 28 U.S.C. § 2254(d). In making the only consequence of an inadequate state record the holding of a federal evidentiary hearing, Congress was clearly stating its intention to make federal fact-finding turn on a federal hearing. Only where a federal district court has the opportunity to make a full assessment of the considerations affecting the weight to be given each historical fact which it finds does it have jurisdiction to reach a result contrary to that reached by the state trier of fact.

What the lower court did in this case was to attribute dispositive value to certain facts and to minimize or ignore others. Absent an assessment of credibility this weighting was outside the scope of habeas corpus review. It was at least as material to voluntariness that Burns went with the troopers voluntarily and by appointment, that he waived counsel, that he said that he wanted to tell his story and that he laid his confession to reasons which were discredited by the trier of fact as it was that he was questioned for several hours and had not slept for more and that his arraignment was delayed for a few hours while the investigation continued. Absent a *de novo* hearing, there

was no reliable way in which the Court of Appeals could have arrived at its conclusion. Under the decisions of this Court in *Brown* v. *Allen, supra, Townsend* v. *Sain, supra* and pursuant to the direct mandate of Congress, it was required to order a hearing once it found the record to be inadequate. This was precisely the request that respondent made of the Court below in its motion for reargument.

2. The decision below is in conflict with prior decisions of this Court and of several circuit courts.

The decision below is incorrect factually as well as legally. The facts revealed in the record demonstrate no colorable claim that Burns' will was overborne by the conduct of the police. See *Procunier* v. *Atchley, supra* at 4127. Simply stated, the police wished to know if Doris Anderson was alive or dead, and if dead, by what means. The record shows that their investigation was reasonable and that they proceeded to each next logical step with the knowing cooperation of respondent. Unlike virtually every case in which a confession has been held coerced, when questioning began in this case, the police did not know that a crime had been committed, let alone that Burns had committed it. They could not arrest Burns and they did not arrest him. When he went to the Ferndale Barracks, he went voluntarily and *by appointment* to take a lie detector test he knew he did not have to take. He was under no restraint. He certainly was not under arrest. There was no way in which he could have been arraigned on any charge.

Although the decision below describes the hours after the polygraph test until 4:30 in the morning as involving "relays of interrogators" it is important to note that those hours involved only two officers, one at a time, and that respondent had been dealing with these very officers for the past three days.

When Burns indicated that he would talk, and before he did talk and "let the cat out of the bag", *United States* v. *Bayer*, 331 U. S. 532, 540, he was told by two officers that he had a right to remain silent and a right to a lawyer. Had he asserted those rights, there is no indication that they would not have been honored. Burns, however, waived his right to counsel and insisted that he wanted to speak. Given this waiver, it was perfectly reasonable to continue to question him.

When he finished speaking, the officers had reasonable grounds to believe that Burns had committed a homicide and they arrested him. At 4:30 in the morning they could not of course, arraign him. Moreover, the officers still did not have the *sine qua non* for a prosecution: corroboration of the confession to the extent of other evidence that a crime had been committed—the *corpus delicti*. N. Y. Code Crim. Proc. § 395. They therefore asked Burns to show them the body and to re-enact the crime both of which he agreed to do. They gave him breakfast and told him that they wanted to reduce his statement to writing. They also told him again that he had a right to a lawyer. For a second time, Burns waived his right to counsel. It was during this period that respondent, confronted with no more than the accusation that he was lying, which, indeed, he was, admitted that he had reloaded the gun after it had accidentally, and harmlessly, discharged.

During all this period, Burns was not beaten and he was not threatened. He, however, claimed that his first statement (at 4:30) was the direct result of a threat by Investigator Buck until which Burns had been energetically holding his own. With respect to the second statement he said simply that the officers told him "if I didn't sign it they couldn't help me". In short, although respondent said he was tired, and although the officers acknowledged that he may have been "drowsy" he did not claim and the record does not show that he confessed because he

was tired or hungry and that, therefore, his will broke. He claimed a threat and a promise, both of which were discredited. The Court below could not find that the reasons lay elsewhere. The People's proof, of course, had to be concerned with the reasonableness of the police conduct as not inherently coercive. When Burns elected to take the stand and pinpoint, falsely, his complaint, he merely supported the fact that what the police did did not force his confession.

Moreover, the findings that lack of food and lack of sleep coerced the confession as a matter of law are untenable. According to Burns' account, he had been without sleep for 22 hours when he made his first statement and for 30 hours when he made his second. The first 11 hours of that time were not in the presence of the police and not attributable to them. Burns himself acknowledged that even on working days he had sometimes stayed up as late as 3 A.M. Nor, under his story, did he work as hard that day as he sometimes did. Moreover, the claim need not have been believed. Respondent's version of the events of the day could have been corroborated but was not. Certainly, there is no reason why Burns could not have slept during the day. Finally even when he was arraigned Burns was alert and responsive. His answers to his interrogatories were clear and responsive and he himself did not attribute his confession to the need for sleep and it should not have been done for him.

The alleged lack of food is an even more insubstantial basis for issuance of the writ. Again, by Burns' own words, he ate during the day. His statement that he ate only once need ont have been believed particularly where investigator Scherpf thought that when he met Burns at the Club Paradise, he had just finished or was just finishing his food. Burns had coffee and pastry during the night and coffee and a sandwich for breakfast, before the second

statement. He had cigarettes. He used the rest room. Certainly, his personal needs were adequately taken care of.

The decision acknowledges that in each case it cites "the presence or absence of some single fact may serve to distinguish appellant's precise situation" and we need only add that those distinguishing facts are critical to those decisions. Indeed, the factual pattern in this case is far less compelling than in many cases decided by this and other courts holding confessions not involuntary as a matter of law. See, *e.g. Johnson* v. *New Jersey,* 384 U. S. 719; *Crooker* v. *California,* 357 U. S. 433; *Cicenia* v. *Lagay,* 357 U. S. 504; *Brown* v. *Allen, supra; Lyons* v. *Oklahoma,* 322 U. S. 596; *McFarland* v. *Wilson,* 266 F. Supp. 576 (N. D. Cal. 1966), *aff'd* 376 F. 2d 852 (9th Cir. 1967), *cert. denied* 389 U. S. 875 (delay of three days during which defendant took polygraph test, confessed, was taken to the scene of the crime and had his statement transcribed without being informed of his rights); *Allen* v. *Bannan,* 332 F. 2d 399 (6th Cir. 1964), *cert. denied* 379 U. S. 905, *reh. den.* 379 U. S. 940 (confession obtained during periods of interrogation over three days); *Cato* v. *Alvis,* 288 F. 2d 530 (6th Cir. 1961) (five days); *Ralph* v. *Pepersack,* 335 F. 2d 128 (4th Cir. 1964), *cert. denied* 380 U. S. 925; *United States ex rel. Petersen* v. *LaVallee,* 279 F. 2d 396 (2d Cir. 1960), *cert. denied* 364 U. S. 922.

Perhaps most significant, however, is the fact that in none of those cases did the defendant waive counsel and his right to remain silent. It is not merely that he did not request counsel, as the opinion below suggests, but he affirmatively rejected the opportunity to assert that right. This case, then raises serious questions with respect even to cases arising after *Miranda* v. *Arizona,* 384 U. S. 436 (1966). This factor, plus the factual and legal conflict between this and other cases, makes this an appropriate case for plenary consideration by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York, April 5, 1971.

Respectfully submitted,

LOUIS J. LEFKOWITZ
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State of New York
Attorney for Petitioner

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APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 238—September Term, 1970.

(Argued November 18, 1970 Decided December 21, 1970.)

Docket No. 34246

UNITED STATES OF AMERICA *ex rel.*
LOUIS HENRY BURNS,
Relator-Appellant,

—v.—

J. EDWIN LAVALLEE, Warden, Clinton State Prison, Dannemora, New York,
Respondent-Appellee.

Before:

KAUFMAN, HAYS and GIBBONS,*
Circuit Judges.

Appeal from the denial by the district court of a petition for a writ of habeas corpus.

We reverse.

ROBERT B. FISKE, JR., New York, New York, *for Relator-Appellant.*

LOUIS J. LEFKOWITZ, New York, New York, *for Respondent-Appellee.*

* Of the United States Court of Appeals for the Third Circuit, sitting by designation.

GIBBONS, *Circuit Judge:*

Appellant was convicted by a jury of second degree murder in the County Court of Sullivan County on January 26, 1966. On March 8, 1966 he was sentenced to twenty years to life imprisonment, and he is still in custody. On direct appeal his conviction was affirmed by the Appellate Division, 27 A.D.2d 861, 277 N.Y.S.2d 531 (3rd Dep't 1967). The Court of Appeals of the State of New York affirmed without opinion, 20 N.Y.2d 814, rearg. den., 21 N.Y.2d 774 (1968). Certiorari was denied. 391 U.S. 956 (1968). Appellant then filed a petition for a writ of habeas corpus. On the basis of the state court record, without a hearing, the district court denied the writ, and this appeal followed. It raises two issues:

(1) Were certain incriminating statements admitted against appellant in the state trial voluntary?

(2) Was the delay in appellant's arraignment on the charge of which he was convicted a violation of federally protected constitutional rights?

Because of the disposition which we make, we reach only the first issue. We hold that on the undisputed historical facts as found in the New York state court proceedings certain inculpatory statements admitted in evidence against appellant were involuntary as a matter of federal constitutional law.

The undisputed facts are these: In April of 1965 appellant, a 27 year old Negro male employed as a caddie at the Concord Hotel golf course, was living with one Doris Anderson at her home in Monticello, New York. Some time toward the end of April Doris Anderson disappeared, and some time early in May her disappearance was noted by the Monticello Police Department, which began an investigation.

On May 8, 1965 appellant was questioned briefly near Doris Anderson's house, where he was still living, about Doris Anderson's whereabouts. He denied knowledge of her whereabouts. On May 9, 1965 he was questioned at the golf course and later was taken in a police car by Lieutenant Yank and two other officers of the Monticello Police Department to the Monticello police station, where he was questioned for about half an hour by several officers and then permitted to go. He explained his possession of Doris Anderson's car, and denied knowledge of her whereabouts.

On May 10, 1965 appellant arose about 6:00 A.M. and went to the golf course, where he caddied for 27 holes, with only a ten minute break for a sandwich. After work he returned to Doris Anderson's house to change clothes and proceeded to the Club Paradise in Monticello, intending to eat. However, Lieutenant Yank of the Monticello Police Department arrived at the Club Paradise accompanied by two state police officers, Investigators Buck and Scherpf. He was asked if he would go to Ferndale Barracks for further questioning relating to Doris Anderson's whereabouts, and he agreed to do so. He was taken in a police car from the Club Paradise, in the company of three officers, not to the nearby Monticello police station, where a magistrate was available, but to the state police barracks at Ferndale, some 12 miles away. The party arrived at Ferndale Barracks at 5:30 P.M., and appellant was brought to a second floor interrogation room. He was not then warned of his right to counsel, or of his right to remain silent, or of the possibility that anything he said might be used against him. He had not technically been arrested, but patently he was the focus of a police inquiry into Doris Anderson's disappearance.

Between 5:30 P.M. and 6:30 P.M. appellant was interrogated by Investigators Buck and Scherpf and by Lieutenant Yank. At 6:30 P.M. Investigator Kalijan, a poly-

graph expert employed by the state police, arrived and from 6:30 P.M. to 9:00 P.M. he, Buck, Scherpf, and Yank continued the interrogation. Between 9:00 P.M. and 10:30 P.M. Investigator Kalijan administered a polygraph test. During these interrogations appellant made no incriminating admissions.

From 10:30 P.M. until 2:00 A.M. on May 11, 1965, appellant was questioned by Investigator Scherpf alone. From 2:00 A.M. until 4:15 A.M. he was questioned by Investigator Buck alone. Appellant did not sleep during this entire period. The disputed testimony, taken in the light most favorable to the interrogators, is that Investigator Scherpf gave him some pastry at some time between 9:00 P.M. and 11:00 P.M. During all this time the interrogators continued to demand that he tell what happened to Doris Anderson, and appellant continued to deny knowledge of her whereabouts. During all this time appellant was not technically under arrest. He was merely alone twelve miles from home, without transportation of his own, on the second floor of a police barracks, in the middle of the night, in the custody of relays of interrogators. He still had received no fifth amendment or sixth amendment warnings.

At 4:30 A.M. Lieutenant Yank entered the interrogation room. At that point appellant broke down and cried and admitted that he had killed Doris Anderson accidentally in the course of a struggle. He gave a detailed version of the circumstances leading up to a fight with Doris Anderson, of her assault against him first with a whisky bottle and then with a rifle, and of an accidental discharge of the rifle as he struggled to wrest it from her hands. He admitted to a state of panic in which he concealed the evidence of Doris' death, and he agreed to show the police where the body was buried. Accepting that testimony most favorable to the police, appellant was given a sandwich and coffee about this time. One officer said it was only coffee.

After he told this story appellant was formally arrested for homicide although his admissions established only an accidental death. About this time, accepting that version of the testimony most favorable to the police, he was told that he could remain silent and was entitled to counsel, but he agreed, instead, to show the police where Doris Anderson was buried.

No effort was made at this point to arraign him. Instead, an imposing company was gathered to accompany appellant in handcuffs to the grave site just outside Monticello which he had described. This company included the District Attorney of Sullivan County, the Sullivan County Coroner, seven state police officials, the Chief, a Lieutenant, and a number of uniformed policemen of the Monticello Police Department.

After locating Doris Anderson's body where appellant said he had buried it, the police party then took appellant to the home which he had shared with the decedent in Monticello. There, at the officers' request and in the presence of the District Attorney, he enacted the circumstances of his struggle with Doris and her accidental death.

It was now at least 8:00 A.M., and a magistrate was available in Monticello. Appellant was not arraigned however, nor was he taken to the Monticello police station. Instead he was returned to Ferndale, where he was given some pastry to eat.

Here a new phase of interrogation began. Investigator Buck would ask a question, Investigator Scherpf would type the question, appellant would answer. Scherpf would type the answer. Preparation of a six and one-half page statement took no less than three hours. Through the first five and one-half pages that statement is consistent with the accidental shooting which he had admitted at 4:30 A.M. Beginning on the middle of page six this appears:

> Q. Now I want to ask you if everything you gave me in this statement is the truth to the best of your knowledge? A. No, I made a mistake in the beginning.

Q. Where did you make this mistake? A. In the statement about the scuffle with DORIS.

Q. If it was a mistake, what did really happen? A. In the part where I have told you that DORIS and I scuffled for the 22 rifle and it discharged striking her in the head. What really happened was that we were scuffling for the rifle and in the bedroom it discharged missing DORIS striking the wall dividing the living room from the bedroom. I pulled the rifle from her and said "Bitch, why would you want to shoot me what have I done to you." I turned around cranked another shell into the rifle I came back at DORIS with the rifle, she was falling onto the bed and the rifle fired striking her in the head. This is the only part of the whole thing that was a misstatement.

Q. Are you sure that this is how the incident occurred? A. Yes.

Q. Are there any other corrections you care to make other than this? A. No, all the statements that I made inclusive of the last one are true.

The change in appellant's story from an accidential to a deliberate shooting occurred at about 11:45 A.M., more than seven hours after his formal arrest on a homicide charge, after over eighteen hours of uninterrupted custodial interrogation, after he had been without sleep, and almost without food, for thirty hours.

This changed statement was the sole piece of evidence sufficient to sustain appellant's conviction for second degree murder.

Some time after 11:45 A.M. appellant read and signed this statement. He was then fingerprinted. About midday, his wife and father-in-law arrived at Ferndale and asked to see him but they were told they could not until he was arraigned.

Finally, at 2:30 P.M. appellant was returned to Monticello, taken before a magistrate, and arraigned twenty-one hours after his custodial interrogation began, ten hours

after his formal arrest, and thirty-two hours after he had last slept. No reason is put forward by the State of New York in explanation of this delay.

Prior to his jury trial appellant had the benefit of a "Huntley" hearing[1] before a judge of the county court of Sullivan County. The facts set forth hereinabove are taken almost entirely from the 514 page transcript of that hearing. The Huntley court found:

> Conclusions of Law
>
> The court after an examination and consideration of all the testimony finds beyond a reasonable doubt:
>
> (1) That the oral and written inculpatory statements were not obtained as a result of any coercion, physical or otherwise.
>
> • • •
>
> (3) That the said alleged inculpatory statements, both oral and in writing, are voluntary ones.

At the trial the statements were admitted in evidence and the issue of voluntariness was submitted to the jury, which convicted. The Appellate Division approved the Huntley findings. The district court, citing *Townsend* v. *Sain*, 372 U.S. 293 (1963), refused to override what it described as satisfactory state court factual findings.

We cannot agree. Accepting the state court findings of the historical facts as true, we conclude that the written statement obtained from appellant at 11:45 A.M. on May 11, 1965 was plainly involuntary, and that the contrary

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[1] New York procedure for compliance with *Jackson* v. *Denno*, 378 U.S. 368 (1964), whereby issue of voluntariness is determined by judge at hearing outside the presence of the jury, and if the judge finds the confession to be voluntary, it is admitted into evidence and the jury must also pass on voluntariness. See *People v. Huntley*, 15 N Y 2d 72, 255 N Y S 2d 838, 204 N E 2d 179 (1965).

state conclusion[2] on this issue is "not fairly supported by the record." 28 U.S.C. § 2254(d)(8).[3] The undisputed facts (appellant's version is even more doleful) surrounding the obtaining of the written admissions which are the evidentiary basis for appellant's conviction on a charge of second degree murder establish that those written admissions were the result of impermissible coercion. A long line of cases in the Supreme Court, e.g., *Darwin* v. *Connecticut,* 391 U.S. 346 (1968); *Greenwald* v. *Wisconsin,* 390 U.S. 510 (1968); *Haynes* v. *Washington,* 373 U.S. 503 (1963), *Spano* v. *New York,* 360 U.S. 315 (1959); *Leyra* v. *Denno,* 347 U.S. 556 (1954); *Watts* v. *Indiana, supra; Ashcraft* v. *Tennessee,* 322 U.S. 143 (1944), and in this court *United States ex rel. Caminito* v. *Murphy,* 222 F.2d 698 (2d Cir.), cert. denied, 350 U.S. 896 (1955), *United States ex rel. Wade* v. *Jackson,* 256 F.2d 7 (2d Cir.), cert. denied, 357 U.S. 908 (1958); *United States ex rel. Williams* v. *Fay,* 323 F.2d 65 (2d Cir. 1963), cert. denied, 376 U.S. 915 (1964); *United States ex rel. Everett* v. *Murphy,* 329 F.2d 68 (2d Cir.), cert. denied, 377 U.S. 967 (1964), amply support that conclusion. No case has come to our attention in which in recent years any federal appellate court, faced with a totality of circumstances approaching those outlined hereinabove, approved use of defendant's confession.

The State correctly points out that appellant is not entitled to the benefit of *Miranda* v. *Arizona,* 384 U.S. 436 (1966) (*Johnson* v. *New Jersey,* 384 U.S. 719 (1966)) and that a state court finding that he did not, during his long interrogation request counsel, precludes the application of *Escobedo* v. *Illinois,* 378 U.S. 478 (1964). But before either *Miranda* or *Escobedo* was decided, a confession obtained in the totality of circumstances here presented had on numerous occasions been held to be the

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[2] Notably, the *Huntley* court designated its findings of absence of coercion and of voluntariness as conclusions of law.

[3] We need not intimate our views as to whether 28 U.S.C. § 2254 does indeed apply to such a determination. See *United States ex rel. Stephen J. B.* v. *Shelly,* 430 F 2d 215, 218 n. 4 (2d Cir. 1970).

product of impermissible coercion. It is true that in each case to which we refer the presence or absence of some single fact may serve to distinguish appellant's precise situation. The test, however, is the totality of circumstances and that test is amply met in the undisputed facts set forth in the state court record and in the per curiam opinion of the Appellate Division. See *People* v. *Burns,* 27 A.D.2d 861, 277 N.Y.S.2d 531 (3d Dep't 1967).

Since we conclude that the writ of habeas corpus must issue because of the use of a coerced confession, we have no occasion to consider appellant's alternative contention that the delay in his arraignment should induce us to apply *McNabb* v. *United States,* 318 U.S. 332 (1943) and *Mallory* v. *United States,* 354 U.S. 449 (1957) to criminal proceedings in New York State. See, however, *Stein* v. *New York,* 346 U.S. 156, 186-188 (1953); *United States ex rel. Glinton* v. *Denno,* 309 F.2d 543, 545 (2d Cir. 1962), cert. denied, 372 U.S. 938 (1963).

The state court has already stated ". . . it must be noted that defendant did not inculpate himself in an intended homicide until long after the typing of the question and answer statement had begun at 9 A.M." *People* v. *Burns, supra,* 27 A.D.2d at 865, 277 N.Y.S.2d at 534. Thus it seems unlikely that any retrial for homicide will be attempted since this sole incriminating statement may not be used. We do not here reach the question whether the non-incriminating oral admissions made at Ferndale Barracks at 4:30 A.M., at the grave site, or at Doris Anderson's home, would be admissible if other incriminating evidence could be found in substitution for the written statement. Suffice it to say that we have strong doubts about the voluntariness under federal constitutional standards of anything that appellant did or said after 4:30 A.M.

We reverse the order appealed from denying the petition for the writ, and direct that a writ be issued at once requiring release of the petitioner unless he is promptly retried on the indictment.

Order reversed with directions to issue the writ applied for.

APPENDIX "B"

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

69-CV-149

UNITED STATES OF AMERICA ex rel. LOUIS HENRY BURNS,

Petitioner,

against

HON. J. EDWIN LAVALLEE, Warden of Clinton Prison, Dannemora, New York,

Respondent.

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION AND ORDER

This petitioner was convicted as charged, of the crime of Murder in the Second Degree after jury trial in Sullivan County. On March 8, 1966 he was sentenced to 20 years to life. On direct appeal the judgment of conviction, in a detailed per curiam writing, was affirmed by the Appellate Division, Third Department, with single strong dissent by Judge Aulisi. (27 A. D. 2d 861-866.) It should be noted that Judge Aulisi concentrated on the claim of coerced or involuntary oral statements, written confession and unreasonable delay in arraignment, with the specific statement he had no serious quarrel with the majority on the other points presented on appeal. The Court of Appeals unanimously affirmed without opinion. (20 N. Y. 2d 814; *rearg. den.* 21 N. Y. 2d 774.) Certiorari was denied. (391 U. S. 956.) An order to show cause was issued by me returnable June 16, 1969, and again, through the cooperation of As-

sistant Attorney General Castellani and the District Attorney of Sullivan County, a transcript of 514 pages of a pretrial "Huntley" hearing have been furnished and the brief of Respondent and the extensive brief of petitioner filed in the New York Court of Appeals. Such briefs shall be filed as part of this record and the transcript shall be returned to Assistant Attorney General Castellani to be kept available for the inevitable appeal.

The petition is typed in neat fashion and is lawyerlike in form and content. The petition for certiorari filed in the United States Supreme Court is submitted and referred to "as the body of this application for a writ of habeas corpus." This petition, lawyer-prepared, presents and covers the number of points raised by the petitioner to invalidate the state judgment of conviction. The points are briefly: (1) that the statement for varied reasons was involuntary; (2) the petitioner's wife and father-in-law refused access to him after his arrest and interrogation; (3) the trial court improperly restricted cross-examination; (4) there was systematic exclusion of negroes from grand and petit juries in the County of conviction; (5) there was an employee relationship not divulged on the voir dire between a juror and a police witness; (6) one of the court officers seen drinking out of same cup used by a female juror; (7) the wife of one of the police witnesses was a member of the Grand Jury that indicted the defendant.

It would seem the only claims that could be considered if factually supported as ones of federal substance are points (1) and (4). Point (2) would only be entitled to consideration as a factor in the determination of the voluntariness of the confession. Likewise, the delay in arraignment is only one factor to be weighed in solution of the serious claim of coerced confession. (*U. S. ex rel. Wade* v. *Jackson,* 2 Cir., 257 F. 2d 7, at pg. 14; *cert. den.* 357 U. S. 908.) Again, it should be noted that the Appellate Division outside the coerced confession claim which it analyzed in detail characterized the other points as unsubstantial. It is conceded

by the petitioner's brief and the Supreme Court petition that there were two negroes on the jury trial panel, and both were peremptorily challenged by the prosecutor. This concession contradicts in itself the systematic and deliberate exclusion of negroes, and there is only left the claim by the petitioner's attorneys that in their thirty years' experience only a minute percentage of negroes were called for jury service. It is established that mere fact that negroes have not served is not sufficient to find the deliberate and systematic exclusion necessary for constitutional deprivation. (*Anderson* v. *Johnson,* 6 Cir., 371 F. 2d 84; *Townsend* v. *Henderson,* 6 Cir., 405 F. 2d 324.)

The claim of coerced confession is always one of serious proportion with which the Court has had long contact and experience. (See *Walker* v. *LaVallee* (NDNY), 224 F. Supp. 661.) The usual factual clash in the testimony concerning the conditions and circumstances that existed after arrest and during the undisputed lengthy interrogation is set forth in detail in the Appellate Division per curiam opinion. "The careful conclusions reached by the Court are given adequate support by description of events and testimony that contradict the important assertions of the defendant made in support of threat and coercion. It was accepted by the appellate court that petitioner had pastry and coffee and pointed out that petitioner conceded no physical force had been exerted upon him." The trial judge made findings of fact about it and then later at the trial submitted against the issue of voluntariness for consideration of the jury. The Appellate Division decision, per curiam majority and the dissent, cite and discuss the pertinent federal rulings that applied.

In my judgment, after careful review, it is clear there were reliable findings made after full and fair hearing, and further a satisfactory appellate canvass of the questions presented here. (*Townsend* v. *Sain,* 372 U. S. 293.) The New York Courts have resolved the conflict in satisfactory

manner and the petitioner has failed to bring himself within any of the reasons that permit a federal court to override such factual findings and analysis by the State Courts. (28 U.S.C.A. 2254(d); *U. S. ex rel. Davis* v. *Follette,* 2 Cir., 410 F. 2d 1135; *U. S. ex rel. Rivera* v. *Follette,* 2 Cir, 395 F. 2d 450.)

The application is denied and dismissed. It shall be filed without prepayment of fee.

It is So Ordered.

Dated: August 28, 1969
Albany, N. Y.

(JAMES T. FOLEY)
United States District Judge

APPENDIX "C"

Supreme Court, Appellate Division, Third Department.

March 1, 1967.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

v.

LOUIS HENRY BURNS, Appellant.

PER CURIAM.

The defendant appeals from a judgment of the County Court of Sullivan County which convicted him, after a trial, of murder in the second degree. The principal issue is the voluntariness of defendant's confession; and we consider first and in some detail the police version thereof, which follows, inasmuch as the Trial Judge and the jury apparently accepted it as substantially true.

Doris Anderson, with whom defendant lived, was fatally shot between the eyes, on or about April 27, 1965. The fact of her death was not known and her body was not immediately found and on May 9, 1965, defendant was questioned as to her disappearance by officer Scherpf, a State Police investigator, at the Monticello Police Station. According to Scherpf, defendant was asked some questions concerning the disappearance and denied any knowledge as to Doris' whereabouts. Defendant had appeared at the station house voluntarily and left after the several questions were put to him.

On May 10, 1965, between four and five o'clock P.M., Scherpf went to the Club Paradise outside Monticello,

accompanied by officer Buck, and finding defendant there asked him to accompany them to the Ferndale State Police Station and defendant agreed to go. He was not then placed under arrest. Officer Kaljian questioned defendant from about six P.M. to nine P.M. and during this time defendant was given some food. Thereafter Scherpf questioned defendant, starting around 10:45 P.M. and ending around 2:00 A.M. on the next day, May 11. Defendant told of his activities on the 27th of April and said that on the morning of April 28 he left the house with Doris asleep on the couch and that he had not seen her since. Subsequently Scherpf left the interrogation room, being relieved by Buck. Buck summoned Scherpf back at about 4:30 A.M. Both investigators were then joined by Lt. Yank of the Monticello police. At this point Scherpf informed defendant he was entitled to counsel, to which defendant replied, "I don't need an attorney, I want to get this off my chest and I have been upset over it the past few days and I just haven't been right." Thereupon defendant stated that he accidentally shot Doris when the gun went off in a scuffle between them; said that this occurred on April 27 in the evening during a heated quarrel which had its origin at the Club Paradise; that before grabbing the .22 calibre rifle Doris had tried to hit him with a whiskey bottle; and that when he jerked the gun away from Doris in her bedroom it discharged once, the bullet entering her forehead. After contemplating his course of action, defendant stuffed the body into a broom closet; cleaned up the rifle and disposed of the empty cartridge; took deceased's dog in deceased's car and left it in the lobby of the Gilbert Hotel in Fallsburg; he went to his job as caddy at the Concord Golf Course (it was then 7 A.M.) and along the way burned bloody linens and towels which he had taken from the house. After work on the 28th, defendant returned to deceased's house, placed her body in her car, and finally buried it in a shallow grave off Old Bailey Road.

Scherpf testified that claimant was formally placed under arrest at 4:30 A.M. and was requested to take the officers to the burial site. He complied and upon leaving the station was handcuffed for the first time. After disclosing the burial site, defendant was taken to deceased's house where he re-enacted the event as he previously had described it. Upon the return to the State Police barracks, defendant's statement was reduced to writing by a question and answer process, being typed as it progressed. This started about 9:00 A.M., May 11, at which time defendant had some pastry and coffee. Again defendant was advised of his right to counsel, but rejected it. By 10:30 or 11 A.M. the typing had been finished and the seven-page statement was complete and signed. By the time the questioning had progressed to the sixth page, however, defendant was challenged as to the truthfulness of his account of the struggle, whereupon he changed his story. In the written statement defendant says he made a mistake; that during the struggle the gun went off, the bullet hitting the wall; that he then said, "Bitch, why do you want to shoot me, I didn't do anything to you"; whereupon, then being possessed of the gun, he put another bullet into the chamber, and discharged the gun as he turned around to face Doris, the bullet striking her between the eyes. Although the statement was taken and completed around 11 A.M., defendant was not arraigned until around 2:30 P.M. There appears to be no explanation for this hiatus.

Scherpf testified that neither he nor any other officer that he knew of made any threats or promises to defendant. He said that he noticed no fatigue insofar as defendant was concerned (although he may have been a bit drowsy at times) and that defendant ate when the interrogators ate.

Buck, testifying as to his period alone with defendant, said that it began about 2:30 A.M. and lasted for about two hours. Defendant told the same story he had told

the day before (May 9) about not knowing how Doris disappeared, but upon being told that he was lying, defendant said, "O K, call your partner, I'll tell you where she is." At this point Scherpf was called back and defendant made his first statement (the "one shot" or accident statement). Buck said that defendant never indicated that he wanted a lawyer. The rest of Buck's testimony conforms generally to Scherpf's.

Lt. Yank testified that he first questioned defendant on May 8 in the street, and that at that time defendant denied knowledge of Doris Anderson's disappearance. Lt. Yank said that on the evening of May 10 when defendant was taken to the State Police barracks he agreed to take a polygraph test after it was explained that he was free not to take it and could walk out of the room. This apparently was done in the early evening and fills the hiatus until 10:45 P.M. when Scherpf took over. Kaljian supervised the polygraph test. Yank also said that defendant partook of sandwiches and coffee in the early morning. According to Yank, defendant was sobbing at 4:30 A.M. when he finally came out with his "one shot" statement. The rest of Yank's testimony conforms generally to Scherpf's and Buck's.

Contesting the voluntariness of the confession, defendant testified at the Huntley hearing only. He said that he told Scherpf, when the latter approached him on May 10 at the Club Paradise, that he had an appointment with Louis Tieger, a lawyer, and felt that he should be advised by him before accompanying Scherpf. It could well be, and doubtless was found that this claim was dissipated by the testimony of Mr. Tieger's secretary. Defendant testified to nothing to account for the first two and one-half hours at the police barracks or until about 8 P.M. when he was questioned by Kaljian, apparently during the polygraph procedures. At about 10 P.M. he was taken downstairs where nothing significant seems to have occurred

until Scherpf began to question him after returning him to an upstairs room at about 11 P.M. He said that he was then exhausted. Continuing, he said that Scherpf then left and Buck took over the questioning, in the course of which he threatened him with his revolver and otherwise, and finally recalled Scherpf, at which time, defendant asserts, he asked for and was denied counsel. Continuing, defendant did not recount his version of an accidental shooting but did tell of the visits to the burial site and to Doris' apartment and of the return to the barracks and the recording of the questions and answers. The transcription of these he disputed in some respects, without, however, stating—or being asked—whether the statements contained the truth. He conceded that no physical force had been exerted upon him.

At the conclusion of the Huntley hearing the court found, *inter alia,* that between 6 P.M. on May 10 and 4:30 A.M. on May 11 defendant consented to interrogation and to the polygraph test; that he was placed under arrest at 4:30 A.M.; and that he waived his right to counsel. As conclusions, the court found that defendant's constitutional right to counsel had not been violated; that his inculpatory statements, both oral and written were voluntary ones and that the circumstances relating to and preceding the arraignment did not consitute unnecessary delay which rendered the statements involuntary.

The court adequately and fairly charged the jury on the issue of voluntariness, including the provisions and the effect of section 165 of the Code of Criminal Procedure respecting arraignment without unnecessary delay.

Upon this record, the Trial Judge's determination upon the Huntley hearing with respect to the confession cannot be disturbed; and the issue was thereafter properly and correctly submitted to the jury, whose finding was warranted.

At the outset, the fact of the lapse of approximately 21 to 22 hours between the time that Scherpf and defendant met at the Club Paradise and defendant's eventual arraignment, demanded and received at our hands the minute examinaiton and analysis that we have attempted to give it. Defendant's assertions of threats and other forms of coercion, including deprivation of food, were properly submitted as factual issues and were resolved against him upon sufficient evidence. The question of prompt arraignment as bearing upon voluntariness was also properly submitted and determined. In this connection it will be recalled that the police did not, so far as appears, have any basis whatsoever for considering that Doris Anderson was dead, or even that her disappearance was the result of any criminal or other act on the part of the defendant or of anyone else, until 4:30 A.M., when defendant first gave his version of a purely accidental death; and it must be noted that defendant did not inculpate himself in an intended homicide until long after the typing of the question and answer statement had begun at 9 A.M. The statement was completed at 11 A.M. and there is no indication that the unexplained time interval ending with the arraignment at 2:30 P.M. affected the previously completed statement. It would not have to be found that the investigation was no longer a "general inquiry" and had "begun to focus" on defendant (Escobedo v. State of Illinois, 378 U.S. 478, 490-491, 84 S.Ct. 1758, 12 L.Ed.2d 977) prior to the first information as to Doris' allegedly accidental death, elicited at 4:30 A.M.; and neither the critical period extending from that time to the completion of the statement at 11 A.M. or to the arraignment at 2:30 P.M., nor, indeed, the aggregate of the periods of defendant's interrogation, can be found, as a matter of law, so extreme as to be coercive (cf. People v. Leonti, 18 N.Y.2d 384, 275 N.Y.S.2d 825, 222 N.E.2d 591; involving a detention of 19 hours and other evidence far stronger against the inculpatory statements than the proof in the case before us).

Defendant did not testify upon the trial and hence his claim, advanced upon the Huntley hearing, of denial of his right to counsel was not before the jury; and the issue was properly resolved against him by the Trial Judge's findings on the Huntley hearing (People v. Gunner, 15 N.Y.2d 226, 232, 257 N.Y.S.2d 924, 928, 205 N.E.2d 852, 855; People v. Holmes, 24 A.D.2d 908, 264 N.Y.S.2d 427); and Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, subsequently decided, is, of course, inapplicable (People v. McQueen, 18 N.Y.2d 337, 274 N.Y.S. 2d 886, 221 N.E.2d 550; Johnson v. State of New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882).

As to weight of evidence—defendant's attempted impeachment of the proof that two shots were fired from the rifle that killed the deceased was thoroughly discredited, or so it could be found, by rebuttal evidence that the shot upon which defendant's theory rests was fired into a different wall from that where the .22 calibre rifle bullet fragment was found and, further, was fired from a shotgun. The remaining proofs, including direct and circumstantial evidence, as well as the proof of a prior altercation and threat to kill and of defendant's attempts at concealment of the body and the other evidences of crime, lend massive support to the verdict.

The attempted impeachment of Lt. Yank by references to a magazine article for which he was said to have supplied factual data, failed when the People's objections were properly sustained, counsel's interrogation respecting this hearsay material proceeding in reverse of the correct method of laying a foundation for impeaching by prior contradictory statements. (Richardson on Evidence [9th ed.], § 514.) We find no merit in appellant's complaints as to the charge and no basis for the additional instructions now said to have been erroneously omitted. Appellant's remaining points are insubstantial and none are such as to require discussion.

Judgment affirmed.

GIBSON, P. J., and HERLIHY, REYNOLDS and STALEY, JJ., concur.

AULISI, J., dissents and votes to reverse and grant a new trial, in the following memorandum.

AULISI, Justice (dissenting):

I can not agree with the majority and vote to reverse and grant a new trial.

When the record is viewed as a whole, there appears to be a violation of fundamental fairness in this case which in the interests of justice calls for a new trial. Of the many allegations of error advanced by defendant, the one attacking the Trial Court's holding that certain oral admissions and a written statement were voluntary—after a Huntley hearing which for various reasons lasted four months—is the principal issue.

Whether a confession is obtained by coercion or improper inducement can be determined only by an examination of all of the attendant circumstances and the court must inquire if the confession was obtained under a totality of circumstances evidencing an involuntary admission of guilt (see Haynes v. State of Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513).

While it is true that prolonged detention in and of itself may not be enough to brand a confession involuntary, it is, however, a circumstance which must be considered together with any other if the delay is for no apparent reason other than that the police needed the confession (see People v. Elmore, 277 N.Y. 397, 14 N.E.2d 451, 124 A.L.R. 465; People v. Spano, 4 N.Y.2d 256, 173 N.Y.S.2d 793, 150 N.E.2d 226).

In Blackburn v. State of Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 the Supreme Court stressed that the modern practice of in-custody interrogation is psychologically rather than physically oriented. "Since Cham-

bers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisiiton." (at p. 206, 80 S.Ct. at p. 279).

Although this case is not governed by Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 because *Miranda* is not retroactive (People v. McQueen, 18 N.Y.2d 337, 274 N.Y.S.2d 886, 221 N.E.2d 550) waiver and its proof existed before *Miranda,* and the Court in that case said at 476, 86 S.Ct. at 1629:

> Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege.

The defendant need not have been advised of his right to counsel before arraignment (People v. Gunner, 15 N.Y.2d 226, 257 N.Y.S.2d 924, 205 N.E.2d 852) and, of course, right to counsel can be waived (People v. Bodie, 16 N.Y.2d 275, 266 N.Y.S.2d 104, 213 N.E.2d 441). But if, after investigation focused upon him as a suspect, the defendant's request for counsel is denied, then his inculpatory statements are inadmissible (Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977; People v. Donovan, 13 N.Y.2d 148, 243 N.Y.S.2d 841, 193 N.E.2d 628).

According to the police testimony here, Burns was first advised of his right to counsel about 4:30 A.M., May 11, although he had been a suspect at least since 10:00 P.M., May 10, when the lie-detector test was over. We must keep

in mind that he had been questioned, although briefly, on May 8 and May 9. While under the *Gunner* rule (supra), failure to advise does not invalidate the confession, it may be considered a factor going to the voluntariness where there is prolonged detention. In Davis v. State of North Carolina, 384 U.S. 737, 740-741, 86 S.Ct. 1761, 1764, 16 L.Ed.2d 895 the Court noted that although the legal effect of *Miranda* (supra) could not retroactively be applied, the failure fully to advise of the right to counsel at the outset of interrogation "is a significant factor in considering the voluntariness of statements later made * * *. Thus, the fact Davis was never effectively advised of his rights gives added weight to the other circumstances described below which made his confessions involuntary."

In the light of the above well established principles, it is my opinion that the voluntariness of defendant's statement was not proven beyond a reasonable doubt where, as here, the defendant had had no sleep and very little food for nearly 30 hours prior to the signing of the statement; had been in the hands of the police for 18½ hours and subjected to almost constant interrogation by a team of trained police investigators; had been subjected to a lie-detector test; was taken to the burial spot; was taken to the residence of the decedent in Monticello where the crime was committed; and then was returned to the state police barracks where further interrogation took place. There is a noticeable failure of recollection by the prosecution witnesses concerning some happenings prior to the defendant's arraignment. They (Scherpf and Yank) do not deny that defendant asked for a lawyer nor is there a denial that the District Attorney said to defendant "There are some statements in that statement that you signed that are not true and I'm going to give you five minutes to change them or else I'm not going to do anything for you, I can't help you and I'm not going to play with you any longer." Neither is there a refutation that access to Burns was denied his wife and father-in-law.

There is no explanation for the delay in arraignment. Defendant was placed under formal arrest at 4:30 A.M., May 11. Although the police took him to Monticello at about 8:30 A.M., four hours after his arrest, he was returned to the barracks 12 miles away and not brought back to Monticello for arraignment until 2:30 P.M. In my view the police were guilty of violating the positive command of our Legislature to arraign without unreasonable delay a person taken into custody (Code Crim. Pro., § 165).

I have no serious quarrel with the majority as to the other points raised by the defendant. Yet, when they are considered *in toto* they do not indicate an air of courtroom fairness and impartiality. It can not be overemphasized that our legal system is concerned as much with the integrity of the judicial process as with the issue of guilt or innocence.

APPENDIX "D"

ORDER ON HUNTLEY HEARING.

COUNTY COURT—SULLIVAN COUNTY.

[SAME TITLE]

COUNTY COURT,

SULLIVAN COUNTY.

A pre-trial "Huntley" hearing having been held on various dates commencing July 22, 1965 and on diverse dates thereafter up to and including November 1, 1965, for the purposes of determining whether certain alleged oral inculpatory admissions and a written confession was voluntary and obtained without violation of defendants constitutional rights and this Court having taken testimony thereon and due deliberation having been had and the Court having rendered a memorandum decision dated November 13, 1965 upon the specification of the People dated October 20, 1965,

Now, on motion of Robert C. Williams, Sullivan County District Attorney, it is

ORDERED, that all oral and written admissions and inculpatory statements set forth in the specifications dated October 20, 1965 be and the same are hereby found to be voluntary and obtained without coercion, physical or otherwise and that defendant's constitutional right to counsel were not violated and that such statements both oral and in writing are voluntary and that there was no unnecessary delay in arraignment so as to make inculpatory statements involuntary, and it is further

ORDERED and determined that no reasonable doubt exists as a matter of law as to the voluntariness of certain oral and written statements.

Signed:

Dated: Monticello, New York, November 15, 1965.

ENTER:

/s/ BENJAMIN NEWBERG
BENJAMIN NEWBERG
County Judge

Findings of Fact and Conclusions of Law in the Huntley Hearing.

COUNTY COURT,
SULLIVAN COUNTY.

[SAME TITLE]

NEWBERG, J.

This is a pre-trial hearing to determine whether alleged oral inculpatory admissions and alleged written confession identified as People's Exhibit One in evidence are voluntary and were not obtained in violation of the defendant's constitutional rights. The defendant is charged with murder in the second degree.

FINDINGS OF FACT

The testimony presented establishes:

(1) That the above named defendant was indicted by the Sullivan County Grand Jury on or about the 28th day of May, 1965, and accused of the commission of the crime of murder in the second degree in violation of section 1046 of the Penal Law of the State of New York.

(2) That the People of the State of New York notified the defendant of their intention to offer alleged oral and written statements purportedly made by the defendant and that the defendant contested the voluntariness of any purported statements made by him.

(3) That the People of the State of New York filed specifications of all purported oral admissions and written statements which they intended to offer upon the trial of the indictment.

(4) That the defendant made the oral admissions set forth in the specifications.

(5) That the defendant executed a written inculpatory statement identified as People's Exhibit One in evidence.

(6) That the defendant with his consent was interrogated on May 9, 1965 between the hours of 3 P.M. and 4.30 P.M. at the Monticello Police Station.

(7) On May 10, 1965 between the hours of 6 P.M. and 4:30 A.M. of May 11th was interrogated at the State Troopers Barracks at Ferndale, New York. That said interrogation was with the consent of the defendant and included a polygraph test.

(8) That the defendant was placed under arrest at 4:30 A.M. and was arraigned at 2:40 P.M. on May 11, 1965. That during this period the defendant was photographed and finger printed and the defendant reenacted the commission of the alleged crime.

(9) That the oral and written admissions were all made prior to the arraignment.

(10) That the defendant waived his right to counsel after being advised of his rights to be represented by counsel.

CONCLUSIONS OF LAW

The Court after an examination and consideration of all the testimony finds beyond a reasonable doubt:

(1) That the oral and written inculpatory statements were not obtained as a result of any coercion, physical or otherwise.

(2) That the defendant's constitutional right to counsel was not violated.

(3) That the said alleged inculpatory statements, both oral and in writing, are voluntary ones.

(4) That the facts and circumstances relating to the arraignment did not constitute any unnecessary delay which rendered the inculpatory statements involuntary.
November 13, 1965.